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Supreme Court, U.S.
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No. 89-

In The
Supreme Court of the United States

October Term, 1989

H. K. PORTER COMPANY, INC.,
Petitioner,

v.

TRANSAMERICA INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

1. Where the lower federal courts, sitting in diversity, improperly shifted the state insurance law burden of proof and thereby foreclosed insurance coverage that would have permitted petitioner to compensate tens of thousands of asbestos claimants, should this Court exercise its supervisory power and reverse so as to prevent a serious impairment of the administration of justice in the federal courts?

2. Where the District Court abused its discretion in applying the Federal Rules of Evidence, thereby compounding the impact of erroneous decisions regarding the state insurance law burden of proof, should this Court exercise its supervisory power and reverse?

II. LIST OF PARTIES

The only parties to this proceeding are those identified in the caption. H. K. Porter Company, Inc., is a wholly-owned subsidiary of Sewickley Company, a Delaware corporation. Porter has no subsidiaries other than wholly-owned subsidiaries.

TABLE OF CONTENTS

		Page
I.	QUESTIONS PRESENTED FOR REVIEW	i
II.	LIST OF PARTIES	ii
III.	TABLE OF AUTHORITIES	v
IV.	OPINIONS OF THE COURTS BELOW	1
V.	JURISDICTIONAL STATEMENT	1
VI.	CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
VII.	STATEMENT OF THE CASE	5
VIII.	REASONS FOR ALLOWANCE OF THE WRIT	9
	A. Unless it is Reversed, the Lower Courts' Improper Shifting of the State Insurance Law Burden of Proof Will Foreclose Insurance Coverage that Would Permit Petitioner to Compensate Tens of Thousands of Asbestos Claimants and Will Seriously Impair the Administration of Justice in the Federal Courts	9
	B. Because the District Court's Abuse of Discretion in Applying the Federal Rules of Evidence Compounded the Impact of the Erroneous Decisions Regarding the State Insurance Law Burden of Proof, this Court Should Exercise Its Supervisory Power and Reverse	20
IX.	CONCLUSION	24

Page

APPENDIX

Judgment Order of the United States Court of Appeals for the Third Circuit, dated September 28, 1989. ..... 1a

Order of Court of the United States District Court for the Western District of Pennsylvania, dated February 27, 1989, entering judgment based upon a special verdict. 3a

Memorandum Order of the United States District Court for the Western District of Pennsylvania, dated February 11, 1988, denying Transamerica's motion to dismiss. 4a

Order of the United States Court of Appeals for the Third Circuit, dated November 9, 1989, denying Petitioner's petition for rehearing and rehearing in banc..... 9a

III. TABLE OF AUTHORITIES

CASES

Page

Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) 9

C.F.W. Constr. v. Travelers Ins. Co., 363 F.2d 557 (5th Cir. 1966) 13

Central Vt. Ry. v. White, 238 U.S. 507 (1915) 17

Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208 (1939) ... 18

Complaint of Bankers Trust Co., 752 F.2d 874 (3d Cir. 1985) 15

Dick v. New York Life Ins. Co., 359 U.S. 437 (1959) .. 18

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 18

Fisher v. Fidelity Mut. Life Assoc., 188 Pa. 1, 41 A. 467 (1898) 16

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) 17

Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964) 15

Hanna v. Plumer, 380 U.S. 460 (1965) 19

Huddleston v. Dwyer, 322 U.S. 232 (1944) 14

Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981), *reh'g denied*, 455 U.S. 1009 (1982) 9

Page

Keene Corp. v. Insurance Co. of N. Am., 513 F. Supp. 47 (D. D.C. 1981), *rev'd*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), *reh'g denied*, 456 U.S. 952 (1982) 13

Mattocks v. Daylin Inc., 452 F. Supp. 512 (W.D. Pa. 1978), *aff'd*, 614 F.2d 769 (3d Cir. 1979) 15

Melville v. American Home Assurance Co., 584 F.2d 1306 (3d Cir. 1978) 15

Miller v. Boston Ins. Co., 420 Pa. 566, 218 A.2d 275 (1966) 15

Miree v. DeKalb County, 433 U.S. 25 (1977) 18

Morie v. New Jersey Mfrs. Indem. Ins. Co., 48 N.J. Super. 70, 137 A.2d 41 (1957) 15

Safeco Ins. Co. of Am. v. Great Am. Ins. Co., No. 87-664-JU (D. Or. Jan. 16, 1990) 13

Smythe v. Inhabitants of New Providence Township, 263 F. 481 (3d Cir. 1920) 22

Speiser v. Randall, 357 U.S. 513 (1958) 18

United States v. Goichman, 547 F.2d 778 (3d Cir. 1976) 21

U.S. Fid. & Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988) 13

Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966) 18

Zenner v. Goetz, 324 Pa. 432, 188 A. 124 (1936) 16

Page

OTHER AUTHORITIES

United States Constitution:
Article III, Section 2, clause 1 2
Amendment X 2
Statutes:
28 U.S.C. § 1254 (1982) 1
28 U.S.C. § 1332 (1982) 6
28 U.S.C. § 1652 (1982) 2
Fed. R. Evid. 901 ..... 3, 21, 22
Miscellaneous:
G. Couch, *Couch on Insurance 2d* (rev. ed. 1983) 15, 16
3 *Mealey's Litigation Rep.: Asbestos* (Feb. 1988-July 1988 Cumulative Index) 11
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IV. OPINIONS OF THE COURTS BELOW

The Order of the United States Court of Appeals for the Third Circuit denying Petitioner's Petition for Rehearing and Rehearing In Banc, dated November 9, 1989, is unreported and is reproduced in the Appendix. 9a. The Judgment Order of the United States Court of Appeals for the Third Circuit, dated September 28, 1989, is not reported and is reproduced in the Appendix. 1a.

The Order of the United States District Court for the Western District of Pennsylvania, dated February 27, 1989, is unreported and is reproduced in the Appendix. 3a. The Memorandum Order of the United States District Court for the Western District of Pennsylvania, dated February 11, 1989, is not reported and is reproduced in the Appendix. 4a.

V. JURISDICTIONAL STATEMENT

The Judgment Order of the United States Court of Appeals for the Third Circuit is dated September 28, 1989. 1a. The Order of the United States Court of Appeals denying Petitioner's Petition for Rehearing In Banc is dated November 9, 1989. 9a.

This Honorable Court has jurisdiction by writ of certiorari pursuant to 28 U.S.C. § 1254(1) (1982):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of a judgment or decree . . . .

VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Tenth Amendment to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. X.

Article III, Section II, clause 1 of the Constitution of the United States provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -to all Cases affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime jurisdiction; -to Controversies to which the United States shall be a Party; -to Controversies between two or more States; -between a State and Citizens of another State; -between Citizens of different States; -between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., art. III, § 2, cl. 1.

The Rules of Decision Act provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652 (1982).

Federal Rule of Evidence 901 provides:

(a) **General provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) **Testimony of witness with knowledge.** Testimony that a matter is what is claimed to be.

(2) **Nonexpert opinion on handwriting.** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) **Comparison by trier or expert witness.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) **Distinctive characteristics and the like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) **Voice identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) **Telephone conversations.** Telephone conversations, by evidence that a call was made to

the number assigned at the time by the telephone company to a particular person or business, if (a) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (b) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) **Public records or reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **Ancient documents or data compilation.** Evidence that a document or data compilation, in any form, (a) is in such condition as to create no suspicion concerning its authenticity, (b) was in a place where it, if authentic, would likely be, and (c) has been in existence 20 years or more at the time it is offered.

(9) **Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Fed. R. Evid. 901.

VII. STATEMENT OF THE CASE

H. K. Porter Company, Inc. ("Porter"), seeks certiorari to review a judgment of the United States Court of Appeals for the Third Circuit affirming a declaratory judgment that certain insurance policies do not provide Porter with any additional coverage for the tens of thousands of asbestos-related disease claims pending against Porter.

Porter has been named as a defendant in claims by approximately 100,000 individuals who allege they have suffered illness or death as a result of exposure to products containing asbestos. Although Porter has settled tens of thousands of asbestos claims, more than 60,000 of them are still pending. In the vast majority of these cases, Porter's alleged liability is predicated on its status as the corporate successor to Thermoid Company ("Thermoid"), a former manufacturer of asbestos products that Porter acquired in 1958.[1] As is typical in asbestos cases, many of the claims against Porter allege that the plaintiff's injuries began during his or her use of asbestos in the 1950s or earlier. As part of its effort to satisfy these claims, Porter has sought coverage under the liability insurance program that Thermoid had in place in the early 1950s.

During the winter of 1983-84, Porter learned that two liability insurance policies had been issued to Thermoid in 1952 and 1953 by Manufacturers' Casualty Insurance Company, the corporate predecessor of Respondent, Transamerica Insurance Company ("Transamerica"). On February 27, 1984, Porter brought this diversity action

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[1]On December 11, 1958, Thermoid Company, a Delaware corporation, and H. K. Porter Company, a Pennsylvania corporation, were merged into H. K. Porter Company, a Delaware corporation, which simultaneously changed its name to H. K. Porter Company, Inc., the Petitioner.

against Transamerica, seeking a declaration of Porter's rights to coverage for asbestos-related bodily injury claims under Transamerica's 1952 and 1953 policies ("the Policies").[2]

The originals and all known copies of the Policies are lost. Nevertheless, in the District Court, the parties stipulated to the following facts regarding the Policies:

(i) The Policies were issued to Thermoid by Transamerica's predecessor;

(ii) One of the Policies (No. LB-1729) is effective for the time period January 1, 1952 through January 1, 1953; the other Policy (No. LAB-1124) is effective for the time period January 1, 1953 to January 1, 1954;

(iii) Each policy covers bodily injury product liability claims, including asbestos claims;

(iv) Authentic copies of a "specimen" form of the Policies were admitted into evidence; those forms set forth the basic provisions of the insurance contracts, except that they were blank as regards names, dates, dollar amounts, limits, and the like; and

(v) The per person limit of Transamerica's liability (for bodily injury product claims) under each Policy was $50,000; the corresponding per accident limit for each Policy was $100,000.

Thus, before the case was submitted to the jury, the parties had stipulated to the issuance of the Policies, the name of the insurer, the name of the insured, the policy numbers,

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[2]The jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked pursuant to 28 U.S.C. § 1332 (1982).

the periods of coverage, the existence of product liability coverage, and the applicable per person and per accident limits of liability. There was no stipulation concerning aggregate limits.

After Porter instituted this lawsuit, but before trial, Transamerica paid $200,000 under the Policies on Porter's asbestos claims. These payments appear to reflect Transamerica's recognition, consistent with its position in the case at bar, that the Policies required Transamerica to pay Porter's asbestos claims, at least up to the $100,000 per year aggregate limit that Transamerica contends is a part of each of the Policies. Accordingly, the dispute in this lawsuit centers on whether the Policies contain a $100,000 annual aggregate liability limit or have no aggregate liability limit. Porter has argued that while each individual asbestos claim is subject to the Policies' per person and per accident limits, the Policies have no aggregate limit and thus do not restrict the number of asbestos claims that Transamerica is obliged to cover. For its part, Transamerica contends that each of the Policies has a $100,000 annual aggregate limit and that, because it has paid that amount on Porter's asbestos claims, it has no additional coverage obligations.

Because the Policies are lost, and due to the passage of nearly 40 years, the parties offered relatively little direct evidence at trial on the aggregate limit issue. The District Court's jury instruction on burden of proof, therefore, was of critical importance. Paradoxically, although Transamerica was relying upon the existence of an aggregate limit as an affirmative coverage defense, the District Court instructed that it was *Porter* that bore the burden of proof, that is, the burden of establishing the *nonexistence* of an aggregate limit. Moreover, the District Court held that

Porter had to meet its burden of proof by the "clear and convincing evidence" standard.

Transamerica's trial position relied extensively upon the introduction of documents that Transamerica asserted were product liability underwriting manuals prepared by the National Bureau of Casualty Underwriters (the "Bureau") for the years 1951, 1952 and 1953. Transamerica asserted that the manuals demonstrated an industry-wide practice among insurance underwriters in 1951, 1952 and 1953 to *always* set aggregate limits when writing products liability coverage.

Porter objected to the admission of the purported underwriting manuals because they had not properly been authenticated. The District Court, however, admitted the manuals into evidence over Porter's objection.

At the conclusion of the trial, the jury returned a special verdict in which it answered the following interrogatory in the negative:

> Do you find that the [policies] did not contain an aggregate limitation of liability for bodily injury product liability claims?

Because the jury concluded that the Policies contained applicable aggregate limits, the District Court entered a final judgment in favor of Transamerica "declaring that the blanket liability policies . . . did not provide unlimited aggregate liability coverage for bodily injury product liability claims." 3a.

VIII. REASONS FOR ALLOWANCE OF THE WRIT

A. Unless it is Reversed, the Lower Courts' Improper Shifting of the State Insurance Law Burden of Proof Will Foreclose Insurance Coverage That Would Permit Petitioner to Compensate Tens of Thousands of Asbestos Claimants and Will Seriously Impair the Administration of Justice in the Federal Courts.

Because of the enormous number of cases in which claimants contend that they have been injured by exposure to products containing asbestos, the importance of the issues involved in this case cannot be overstated.[3] The instant insurance coverage case, which arises as a direct result of the thousands of asbestos bodily injury lawsuits that are clogging federal and state court dockets throughout the United States,[4] is an appropriate vehicle by which this Court can begin to address the asbestos litigation logjam.

Federal appellate court decisions rendered during the 1970s nurtured the growth of asbestos litigation. For example, in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), the Fifth Circuit held that manufacturers of asbestos-containing products could be held jointly and severally liable for asbestos-related diseases that were caused, in part, by their products. After *Borel*, an increasing number of asbestos victims began to file claims.[5] By 1981, approximately

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[3]*See Asbestos: The Saga Drags On*, N.Y. Times, April 2, 1989, § 3, at 1, col. 4 (hereinafter *"Asbestos"*).

[4]*Id.* "[A]sbestos-related claims continue to pour into courts at a rate of well over 1,000 a month . . . . As a result, the courts' backlog, already the biggest in product liability history, is growing."

[5]In *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1215 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981), *reh'g*

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12,000 product liability claims against asbestos manufacturers had been filed in state and federal courts, and the number of cases was then increasing at the rate of 400 per month.[6] At that time, estimates of the total of potential recoveries against asbestos products manufacturers ran into hundreds of millions of dollars.[7]

During the 1980s the number of asbestos cases rose almost beyond belief. Currently, more than 100,000 claimants nationwide allege asbestos-related injuries.[8] The

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denied, 455 U.S. 1009 (1982), the Court of Appeals stated that *Borel* precipitated "an avalanche of lawsuits against the entire asbestos manufacturing industry."

[6]*Asbestos Injury Suits Mount, With Severe Business Impact*, N.Y. Times, July 3, 1981, § 1, at 1, col. 1.

[7]*See* Legal Times of Washington, October 12, 1981, at 1, col. 1.

[8]*See Asbestos* at 1, col. 4 through p. 11, col. 6. The onslaught of asbestos-related litigation has been borne by large and small companies alike, including the following: AAER Sprayed Insulation; Abex Corp.; AC&S, Inc.; American Asbestos Textile Corp.; Anchor Packing; Armstrong Cork Co.; Architectural Sales, Inc.; Armstrong World Industries; Asbestos Corporation, LTD.; Babcock & Wilcox; Bell Asbestos; Capasco, LTD.; Cape Industries, P.L.C.; Carey Canada, Inc.; Celotex Corp.; Charter Consolidated, P.L.C.; Combustion Engineering, Inc.; Continental Products Corporation (CPC); E.I. du Pont de Nemours and Company; Eagle-Picher Industries; Forty-Eight Insulations, Inc.; Fibreboard Corp.; Flintkote Corp.; GAF Corp.; Johns-Manville Corp.; Johns-Manville Sales Corp.; Kaiser Gypsum Co.; Keene Corp.; Lake Asbestos of Quebec (LAQ); MacArthur Company: National Gypsum Co.; North American Asbestos Corp. (NAAC); Nicolet, Inc.; Owens-Corning Fiberglas Corp.; Owens-Illinois Corp.; Owens-Illinois, Inc.; Philip Carey/Celotex; Philip Carey Manufacturing Co.; Pittsburgh Corning Corporation; Porter Hayden Company; Proko Industries; Raymark Industries, Inc.; Raytech Corp.; Smith Chemical and Color, Incorporated; Southern Textile; Thorpe Insulation Company; Turner Asbestos Fibres LTD.; Turner & Newall LTD.; Turner & Newall PLC; Union Asbestos & Rubber Co. (UNARCO); Union Carbide; Uniroyal Co.; United States Gypsum Co.; UNR Industies; United States Gypsum

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figures are equally staggering when examined from the perspective of the particular defendant companies. For example, by early 1984, more than 16,000 asbestos-related claims representing 20,000 claimants had been asserted against Porter. Since then the number has increased dramatically, and today it is estimated that 100,000 asbestos bodily injury claims have been made against Porter, some 60,000 of which are pending.

This flood of asbestos claims has resulted in heretofore unimaginable, and sometimes overwhelming, financial liabilities for former manufacturers of asbestos products.[9] Consequently, issues involving the existence and extent of insurance coverage for asbestos claims are vitally important to the scores of companies confronted with the massive asbestos liability. In many instances, insurance issues have contributed to an asbestos manufacturer's decision to file for bankruptcy.[10]

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Co.; U.S. Mineral Products Co.; W.R. Grace; Western MacArthur Company; Wilkin Insulation Co.; Wilkin Properties Co. *See*, 3 *Mealey's Litigation Rep.: Asbestos* (Feb. 1988-July 1988 Cumulative Index); 4 *Mealey's Litigation Rep.: Asbestos* (Feb. 1989-July 1989 Cumulative Index).

[9]*Asbestos*, at 1, col. 4. Prior to filing for protection under Chapter 11 of the United States Bankruptcy Code, UNR Industries was said to be incurring asbestos litigation expenses in excess of $1 million per month. The massive financial strain associated with asbestos litigation forced two other former manufacturers of asbestos products, Nicolet Inc. and Forty-Eight Insulations, Inc., to liquidate. *Id.*

[10]Several former manufacturers of asbestos products have filed for protection under Chapter 11 of the United States Bankruptcy Code, including Johns-Manville Corp. (1982), UNR Industries (1982), Amatex Corporation (1982) and Raytech Inc. (1989). Other companies, overwhelmed by asbestos-related liability, have been liquidated, including Nicolet Inc. and Forty-Eight Insulations, Inc. *Id.*

Proper resolution of insurance coverage issues is important not only to the manufacturers of asbestos products, but also to the injured asbestos victims. Erroneous insurance coverage decisions, such as in the instant case, can preclude policyholders like Porter from drawing upon critical product liability insurance coverage. Depending upon their other financial resources, policyholders may have no other means of satisfying the claims of asbestos victims who, of course, are the ultimate beneficiaries of any decision declaring product liability coverage in favor of a former asbestos manufacturer. In a sense, therefore, former asbestos manufacturers seeking a declaration of product liability coverage are "representing" tens of thousands of asbestos victims.[11]

Moreover, incorrect insurance coverage decisions can exacerbate the asbestos case backlogs that are clogging dockets across the country and hindering the administration of justice in the federal courts.[12] In April, 1989, *The New York Times* commented that, while asbestos defendants have always had differing settlement strategies,

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[11]In ruling that the non-party claimants were not indispensable parties to this lawsuit, the District Court found that Porter could be counted on, in a sense, to represent the claimants' interests, stating, "As non-parties, [the claimants] cannot be bound by a judgment in this case, and as a practical matter, [H.K. Porter Company, Inc.], who faces depletion of its assets if defendant is held not to have an obligation to indemnify it, will defend vigorously their interest in preserving as large a fund as possible to satisfy their claims .... If plaintiff prevails, it has a larger fund available from which to satisfy the injured parties' claims. True, if H.K. Porter loses in this action, the fund of money to satisfy claims will be lesser, but H.K. Porter, who must satisfy those claims or enter bankruptcy, has great incentive to protect the claimants' interest in this action." 5a-6a.

[12]According to recent figures, approximately 10,000 asbestos suits, many of which represent thousands of claimants, are pending in federal courts. *Asbestos*, at 11, col. 3-4.

"[m]any with extensive insurance coverage have sought to settle complaints quickly. Those with fewer resources have often taken a tougher stand."[13] The availability of insurance coverage for asbestos claims, therefore, has an important impact on judicial efforts to unclog the asbestos case jam that is slowing the work of America's federal and state courts, a problem that has been exacerbated during the past eighteen months by the demise of the Asbestos Claims Facility.[14]

The implications raised by this case, therefore, are important and pervasive. Facing tremendous liabilities arising out of their asbestos-containing products, and given the plaintiffs' allegations of asbestos product use over many decades, policyholders such as Porter have been forced to seek coverage under product liability insurance policies that were issued decades ago. In many of these cases, neither the policyholders nor the insurers have maintained copies of these policies.[15] Under corporate document retention/destruction policies, these documents often have been discarded by both the policyholders and the insurers. In other instances, the policies simply have

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[13]*Id.* at 11, col. 5.

[14]The Asbestos Claims Facility, which "brought together 36 asbestos manufacturers and 16 insurers in an attempt to settle claims before they reached litigation," broke up in 1988. *Id.*

[15]*See, e.g., Keene Corp. v. Insurance Co. of N. Am.*, 513 F. Supp. 47 (D. D.C. 1981), *rev'd*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), *reh'g denied*, 456 U.S. 951 (1982). In the *Keene* litigation, among the issues raised was whether one of the insurers had issued product liability coverage to the plaintiff between 1948 and 1959. Predictably, although there were indications that liability policies of some sort had been issued to cover the period in question, copies of the policies could not be found. *See also, C.F.W. Constr. v. Travelers Ins. Co.*, 363 F.2d 557 (5th Cir. 1966); *Safeco Ins. Co. of Am. v. Great Am. Ins. Co.*, No. 87-664-JU (D. Or. Jan. 16, 1990); *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988).

been lost. Thus, policyholders frequently face the difficult challenge of proving, through secondary evidence, the existence of insurance coverage purchased twenty to forty years earlier.

The policyholders' success or failure in proving the existence of historic insurance coverage may determine whether they are able to satisfy claims in the underlying asbestos cases. Thus, the burden of proving the existence and terms of lost insurance policies, as well as the quantum of proof necessary to meet the burden, have gained extraordinary significance for those liability insurance policyholders who are faced with the asbestos claims. Not surprisingly, in cases such as this one, the assignment of the burden of proof and the determination of the necessary quantum of evidence can effectively determine the outcome of the litigation.

Petitioner is aware of this Court's inclination to address errors involving federal courts' application of state law only in exceptional cases. As this Court stated in *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944), "[O]rdinarily we accept and therefore do not review, *save in exceptional cases*, the considered determination of questions of state law by intermediate federal appellate courts" (emphasis added). The egregiousness of the lower courts' errors in this case, together with the earlier-discussed importance of the questions presented herein, renders this an "exceptional case" which this Court should review.

The lower courts' decision to place the burden of proving the nonexistence of an insurance policy coverage limitation on Porter contradicts the established insurance

law of Pennsylvania, New Jersey and other states.[16] Under Pennsylvania and New Jersey law, the burden of proving insurance policy limitations, exceptions, exclusions, and restrictions rests with the party that raises such affirmative defenses. *Mattocks v. Daylin Inc.*, 452 F. Supp. 512, 514 (W.D. Pa. 1978), *aff'd*, 614 F.2d 769 (3d Cir. 1979); *Miller v. Boston Ins. Co.*, 420 Pa. 566, 570, 218 A.2d 275, 277 (1966); *Morie v. New Jersey Mfrs. Indem. Ins. Co.*, 48 N.J. Super. 70, 76, 137 A.2d 41, 44 (1957). The foregoing principle likewise has been adopted by the majority of appellate courts of other states that have addressed the issue. As a leading insurance treatise instructs, "The insurer bears the burden of proving the applicability of policy limitations and exclusions in order to avoid an adverse judgment after the insured has sustained its burden and made its prima facie case." 19 G. Couch, *Couch on Insurance 2d*, § 79:315 (rev. ed. 1983).

By requiring Porter to prove a negative—the nonexistence of a limitation on its insurance coverage—the courts below contravened state law and thrust an unreasonable burden upon Porter with the result that, for practical purposes, the case was decided against Porter before it ever reached the jury. Moreover, the error was compounded by

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[16]The burden of proof issue is controlled by state law. Under Pennsylvania choice of law principles, it could be argued that either Pennsylvania or New Jersey law would control this issue. *See Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); *Melville v. American Home Assurance Co.*, 584 F.2d 1306 (3d Cir. 1978). Though the parties never specifically stipulated whether Pennsylvania or New Jersey law governs the interpretation of the terms of the Policies, Transamerica never disputed Porter's assertion that the District Court was presented with a "false conflict," insofar as the law of the forum state (Pennsylvania) and the law of the alternative jurisdiction (New Jersey) do not differ. *See Complaint of Bankers Trust Co.*, 752 F.2d 874, 882 (3d Cir. 1985). References herein are primarily to Pennsylvania law, although the law of New Jersey appears to be identical.

the District Court's charge that it was Porter's burden to establish the nonexistence of an aggregate liability limit by "clear and convincing evidence," rather than by the "preponderance of the evidence" standard.

The error in the decision below is all the more glaring when the result is taken to its logical conclusion. In its Answer in the District Court, Transamerica set forth the alleged exhaustion of its policy limits as an affirmative defense. The existence and amounts of such liability limitations are essential elements of Transamerica's affirmative defense. As suggested in *Couch,* a limitation of liability should be treated in a manner analogous to policy exclusions, restrictions, and other limitations for purposes of allocating the burden of proof. "The insurer has the burden of establishing a limitation of its liability." 19 G. Couch, *supra,* § 79:417. The Third Circuit, however, approved the placing on Porter of the burden of demonstrating that an annual aggregate limitation of the insurer's liability did not exist. Thus, Porter had the burden of proving a negative and proving that Transamerica's affirmative defense had no merit. In rejecting a similar argument, the Supreme Court of Pennsylvania once explained that "it would necessarily follow that, for the same reason, [the insured would be] required to establish the nonexistence of all other stringent provisions by which the policy might be avoided." *Zenner v. Goetz,* 324 Pa. 432, 436, 188 A. 124, 126 (1936); *accord Fisher v. Fidelity Mut. Life Assoc.,* 188 Pa. 1, 13, 41 A. 467, 468 (1898). The District Court and the Court of Appeals, in the instant case, have not just refused to follow state law, they have turned the burden of proof on its head.

The foregoing principles of state law make no allowances for shifting the burden of proving an alleged

limitation of liability simply because a policy is lost. Instead, the loss of a written contract (or its unavailability at trial) at most serves only to elevate the standard of proof required of the party relying upon the instrument. The unavailability of such a "lost contract," however, does not warrant the shifting of the burden of proof.

The burden of proof decisions below establish a troubling precedent for future cases. Under the logic of the lower courts' rulings, the proponent of a lost insurance policy may be required to prove the nonexistence of whatever exclusions, exceptions, and coverage restrictions that the insurer may claim. The message sent to the insurance industry by this case is clear: in lost policy cases, raise every possible exclusion, exception and restriction to test whether the insured can prove their nonexistence by "clear and convincing" secondary evidence. More fundamentally, the decision creates a situation in which insurance companies would have an interest in *not* preserving records of their policies, because, ultimately, it will be the insured who will bear the burden of proving coverage and the absence of exclusions or limitations.

In its failure to follow established state insurance law pertaining to the applicable burden of proof and the quantum of proof necessary to satisfy that burden, the Court of Appeals disregarded numerous decisions in which this Court has held that state rules regarding burden of proof are matters of substance which federal courts must apply in diversity cases.

This Court has long recognized that the allocation of the burden of proof directly affects the substantive rights of the parties, and is not merely a matter of procedure. *See, e.g., Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 248-249 (1942); *Central Vt. Ry. v. White,* 238 U.S. 507, 511-12

(1915). As noted in *Speiser v. Randall,* 357 U.S. 513, 515 (1958), "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome."

Because of its substantive effect upon the rights of the parties, a federal court sitting in diversity must follow the applicable state law regarding burden of proof. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938). *See also, Dick v. New York Life Ins. Co.,* 359 U.S. 437, 446 (1959) ("Under the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive' . . . ."); *Cities Serv. Oil Co. v. Dunlap,* 308 U.S. 208, 212 (1939) (Burden of proof in matters affecting real estate "relates to a substantial right" and is governed by state law).

Given the quantity and clarity of state decisional authority on the burden of proof issues presented in this case, it can hardly be argued that the lower courts were confronted with a novel issue of state law. Nor can their shifting of the burden of proof be justified as an attempt to interpret the law of Pennsylvania or New Jersey as it would be interpreted by the highest courts of those states. Thus, despite the fact that the lower courts purported to be deciding issues of state law, the only plausible explanation for their action is that, in effect, a federal common law rule was devised.

The decisions of this Court clearly forbid the creation of federal common law under the circumstances presented in this case. This clear rule applies to litigation "among private parties [even though] . . . no substantial rights or duties of the United States hinge on its outcome," *Miree v. DeKalb County,* 433 U.S. 25, 31 (1977), whether or not the case involves "a significant conflict between some federal policy or interest and the use of state law." *Wallis v. Pan Am. Petroleum Corp.,* 384 U.S. 63, 68 (1966). In this case,

the lower courts were obliged to follow state insurance law pertaining to the burden of proof:

> We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.

Hanna v. Plumer, 380 U.S. 460, 471-72 (1965).

In effect, the courts below have devised federal common law regarding the burden of proof for limitations in lost insurance policy cases, which law conforms with those courts' views of the rights and liabilities of the parties, and does not conform with state insurance law. Such caprice threatens the legal relationships between insurers and insureds in asbestos cases and in cases involving similar risks.

This case demonstrates the mischief that results from a misplaced burden of proof. Because Porter could not "clearly and convincingly" establish the nonexistence of a limitation upon its liability coverage, Transamerica avoided a substantial coverage obligation which ultimately would have benefited thousands of tort claimants. A similar fate awaits other asbestos victims if this decision stands.

B. Because the District Court's Abuse of Discretion in Applying the Federal Rules of Evidence Compounded the Impact of the Erroneous Decisions Regarding the State Insurance Law Burden of Proof, this Court Should Exercise Its Supervisory Power and Reverse.

As noted before, the latent injury aspect of asbestos litigation, coupled with the vast number of asbestos claimants, has forced former manufacturers of asbestos products to rely upon their historic insurance coverage. Often the policies under which these manufacturers seek coverage have been lost or destroyed. Because there are scant surviving documents in these cases, those documents which are admitted into evidence necessarily have a highly persuasive effect on jurors. Thus, evidentiary issues such as the proper authentication of documents take on heightened importance in lost policy cases.

In the case at bar, where Porter improperly has been held to have the burden of proving the absence of a coverage limitation by clear and convincing evidence, an evidentiary issue regarding document authentication turned out to be critically important to the jury's verdict.

Transamerica's defense relied extensively upon the introduction of three documents, which Transamerica contended were copies of product liability underwriting manuals effective for the years 1951, 1952 and 1953, as prepared by the National Bureau of Casualty Underwriters (the "Bureau").

Transamerica introduced the manuals through its expert witness, Ronald Almquist. Porter made repeated objections to the introduction of the manuals on the grounds that the documents were admittedly incomplete,

materially altered and otherwise not properly authenticated. The District Court, however, abused its discretion and admitted the manuals into evidence.

Rule 901 of the Federal Rules of Evidence provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by *evidence sufficient to support* a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901 (emphasis added). Pursuant to Rule 901, Transamerica had the burden to provide "substantial evidence" from which the jury could infer that the document is genuine. *United States v. Goichman,* 547 F.2d 778, 784 (3d Cir. 1976).

Rule 901(b) provides illustrations of the means by which a proponent may provide such "substantial evidence." Of these, three are pertinent to the attempted authentication of the manuals in this case.

The first method is by the testimony of a witness with knowledge that the evidence is what its proponent claims it to be. Fed. R. Evid. 901(b)(1). Transamerica's expert witness, however, did not present any meaningful evidence establishing a *prima facie* case of authenticity, because: (1) he had no knowledge of the source of the manuals or of the manner in which they were maintained or amended; (2) Transamerica admitted that an unknown person altered the manuals by adding certain notations relating to effective dates, but its witness had no explanation relating to the alteration of the manuals; (3) after the District Court redacted the alterations, Almquist was unable to testify to the manuals' effective dates; and (4) Transamerica admitted that the manuals were incomplete.

Second, the District Court could not have properly concluded that the manuals were self-authenticating documents, that is, documents that are authenticated by virtue of their "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Fed. R. Evid. 901(b)(4). Although the documents contained a stamp which indicated that they *might* have come from the successor to the Bureau, Transamerica's witness conceded that such a conclusion would be speculation. Further, the pages of the manuals lacked internal consistency, they contained various and sundry effective dates in no particular order, and they were stamped with numbers that followed no discernible sequence or pattern. For these reasons, the authenticity of the manuals could not have been established under Fed. R. Evid. 901(b)(4).

Finally, the District Court could not have properly concluded that the manuals qualified for authentication as ancient documents. Fed. R. Evid. 901(b)(8); *see also Smythe v. Inhabitants of New Providence Township*, 263 F. 481 (3d Cir. 1920); 5 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 901(b)(8)[01](1989). Although the documents have been in existence more than twenty years, Transamerica offered no witness with knowledge of the place from which the manuals were recovered. Further, the material alterations and modifications of the manuals by unknown persons raise substantial doubts as to their authenticity, precluding any finding that they are ancient documents.

The District Court's abuse of discretion in admitting the purported underwriting manuals into evidence compounded its errors on the burden of proof, with the result that it was virtually impossible for Porter to persuade the

jury. By wrongly imposing the burden of proof on Porter, and by improperly admitting the manuals, the District Court hit Porter with a combination punch that sent Porter to the trial courtroom's "canvas."

In the exercise of its supervisory power, this Court should reverse the District Court's ruling admitting the underwriting manuals so that Porter may have a fair opportunity upon retrial of this case.

IX. CONCLUSION

For the foregoing reasons, this petition should be granted. If the Petitioner is correct in urging that the Third Circuit erroneously decided the questions presented in this petition, the matter should be remanded to the District Court for appropriate disposition.

Respectfully submitted,

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Dated: February 5, 1990

APPENDIX

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 99-3145

H. K. PORTER COMPANY, INC.

v.

TRANSAMERICA INSURANCE COMPANY

H. K. PORTER COMPANY, INC.,
a corporation,
Appellant

Appeal from the United States District Court for the Western District of Pennsylvania (Pittsburgh)
(D.C. Civil Action No. 84-00442)
District Judge: Hon. Gustave Diamond

Submitted Under Third Circuit Rule 12(6)
September 26, 1989

Before: HIGGINBOTHAM, STAPLETON and SCIRICA, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

/s/ A. LEON HIGGINBOTHAM
Circuit Judge

Attest:

/s/ SALLY MRVOS
Sally Mrvos, Clerk

(Stamped) Sept. 28, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

H.K. PORTER COMPANY, INC.,
Plaintiff,
v.
TRANSAMERICA INSURANCE COMPANY,
Defendant.

CIVIL ACTION
No. 84-442

ORDER OF COURT

AND NOW, this 27th of February, 1989, based upon the February 22, 1989, answers to the special verdict submitted pursuant Fed.R.Civ.P. 49 (a), judgment is entered declaring that the blanket liability policies bearing Policy Nos. LB 1729 and LAB 1124 issued to The Thermoid Company, the predecessor to the plaintiff, H.K. Porter Company, Inc., did not provide unlimited aggregate liability coverage for bodily injury products liability claims.

Accordingly, IT IS ORDERED that judgment be, and the same hereby is, entered in favor of the defendant, Transamerica Insurance Company, and against the plaintiff, H.K. Porter Company, Inc.

/s/ GUSTAVE DIAMOND
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

H.K. PORTER COMPANY, INC., a corporation,
Plaintiff,
v.
TRANSAMERICA INSURANCE COMPANY, a corporation,
Defendant.

CIVIL ACTION
No. 84-442

MEMORANDUM ORDER

AND NOW, this 11th day of February, 1988, upon consideration of defendant's motion to dismiss, IT IS ORDERED that defendant's motion be, and the same hereby is, denied for the following reasons:

1) This is a declaratory judgment action to determine whether defendant has an obligation under an insurance contract between it and plaintiff to defend and indemnify plaintiff for the tens of thousands of claims asserted against plaintiff by people injured by plaintiff's asbestos products. Defendant has moved to dismiss for failure to join indispensable parties—the injured claimants. *See* Fed.R.Civ.P. 19.

2) Federal law governs the necessity and indispensability of parties in diversity actions. *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125 n.22 (1968).

3) Defendant has not carried its burden of demonstrating that the asbestos claimants are necessary for a just adjudication. *See* Fed.R.Civ.P. 19(a);

Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 16009, p. 129 (1986). Complete relief can be accorded to the parties in their absence. This case concerns the rights of parties to an insurance contract, and all parties to the contract are before the court. The claimants' interest will not be impaired in their absence. As nonparties, they cannot be bound by a judgment in this case, and as a practical matter, plaintiff, who faces depletion of its assets if defendant is held not to have an obligation to indemnify it, will defend vigorously their interest in preserving as large a fund as possible to satisfy their claims. Defendant summarily asserts that it could face multiple and inconsistent liability if the claimants are not bound by the result of this litigation. But defendant cites no law to show that the claimants have a direct action against it on an insurance contract to which they were not parties. *See Pettus v. Jones & Laughlin Steel Corp.*, 322 F.Supp. 1078, 1081 (W.D.Pa. 1971) ("Under the law of Pennsylvania, an injured person has no right of direct action against the insurer of an alleged tortfeasor unless the applicable insurance policy or a statute creates such a right."); *see also Philadelphia Electric Co. v. Leonard*, 27 D&C3d 723, 725 (Pa. 1982) (collecting cases).

4) Even if the claimants are necessary parties, their joinder is not feasible. *See* Fed.R.Civ.P. 19(b). They number at least 40,000, with more added each week. Their joinder would destroy complete diversity and defeat subject matter jurisdiction. We cannot assert personal jurisdiction over all of them.

5) Assuming the claimants are necessary parties, since the claimants' joinder is not feasible, we

must decide "whether in equity and good conscience the action should proceed among the parties before [the court], or should be dismissed, the absent party being thus regarded as indispensable." Fed.R.Civ.P. 19(b); *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108 (1968). Considering the equities and the four factors listed in Rule 19(b), we conclude that the asbestos claimants are not indispensable.

6) A judgment rendered absent the claimants would not prejudice their interests. Since they are not parties, they would not be bound. *See Provident Tradesmen*, 390 U.S. at 114. If plaintiff prevails, it has a larger fund available from which to satisfy the injured parties' claims. True, if H.K. Porter loses in this action, the fund of money to satisfy claims will be lesser, but H.K. Porter, who must satisfy those claims or enter bankruptcy, has great incentive to protect the claimants' interest in this action. A judgment rendered absent the claimants will be adequate. *See* para. 3, *supra* (rejecting defendant's claim of multiple liability); *ACandS, Inc. v. Aetna Casualty & Surety Co.*, 764 F.2d 968 (3d Cir. 1985) (adjudicating declaratory judgment action between asbestos manufacturer and insurer without joinder of victims).

7) If this action is dismissed for nonjoinder, plaintiff has no other adequate remedy. No court could assert personal and subject matter jurisdiction over all these claimants. Their number would make any action to which they are parties unmanageable and unsettleable. *See Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, 1 Mealey's Lit. Rep. (Insurance) 202 (D.C. Cir. Feb. 14, 1986) (unpublished opinion); *cf. Maryland Casualty Co. v. Consumers Finance*

Service, 101 F.2d 514, 151-16 (3d Cir. 1938) (error to dismiss declaratory judgment action between insured and insurer on the mistaken premise that personal injury action against insured could give the parties adequate relief).

8) Finally, in the exercise of our discretion, we cannot ignore the untimeliness of this motion. Defendant made it 26 months after filing its answer, 14 months after the filing of pretrial narratives and 13 months after this case was placed on our trial list. To excuse this, defendant claims that it relies on a decision recently rendered by the court of appeals, *Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345 (3d Cir. 1986). However, this case was decided 11 months before defendant's motion. Moreover, it is evident from defendant's brief that the primary support for its motion is *Vale Chemical Co. v. Hartford Accident & Indemnity Co.*, 512 Pa. 290, 516 A.2d 684 (1986). *Vale* was decided more than a year before this motion, and by defendant's own assertions in its brief, *Vale* followed established Pennsylvania law going back *20* years. *See* Defendant's Notice of Motion and Motion to Dismiss, p. 5.

9) *Federal Kemper Insurance Co. v. Rauscher*, 807 F.2d 345 (1st Cir. 1986), is distinguishable. There, the court of appeals held that the injured parties had standing in a declaratory judgment action by an insurer even after the insured had been dismissed from the action. In dicta, the court opined that the injured parties were indispensable under Rule 19. *See* 807 F.2d at 354 ("Although it is not necessary to our analysis or conclusion . . . ."). This dicta turned in part on the Pennsylvania No-Fault Insurance law, which authorizes direct actions by injured parties against insurers. The

court noted that absent statutory authorization, Pennsylvania law does not permit direct actions by injured parties against insurers. *Id.* at 354 n.6. There is no analogous statute in the present case. Moreover, the determination that a person is indispensable is an equitable determination that turns on the facts of each case. The facts of *Rauscher*, in which the insured had defaulted leaving no one to protect the injured parties' interests and in which there were only two injured parties, differ markedly from this case in which there are at least 40,000 injured parties and a determined plaintiff.

/s/ GUSTAVE DIAMOND
United States District Judge

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United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 89-3145

H. K. PORTER COMPANY, INC.

v.

TRANSAMERICA INSURANCE COMPANY

H. K. PORTER COMPANY, INC., a corporation,

Appellant

(D.C. Civil No. 84-00442)

SUR PETITION FOR REHEARING
Filed Nov. 9, 1989

Present: GIBBONS, *Chief Judge,* HIGGINBOTHAM, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges.*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges

of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ A. LEON HIGGINBOTHAM
Circuit Judge

Dated: Nov. 9, 1989

Supreme Court, U.S.
FILED
MAR 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1247

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

H.K. PORTER COMPANY, INC.,

Petitioner,

v.

TRANSAMERICA INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. In this diversity case, did the United States District Court for the Western District of Pennsylvania correctly interpret Pennsylvania law in instructing the jury to determine whether, in a case involving a lost insurance policy, it had been proven by clear and convincing evidence that the lost policy contained a term providing product liability bodily injury coverage without aggregate limitation?

II. Did the District Court abuse its discretion in admitting into evidence certain National Bureau Underwriting Manuals where the testimonial evidence, as well as the manuals themselves, clearly supported a finding that the manuals were authentic?

LIST OF PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Respondent Transamerica Insurance Company was the defendant below and is a nationwide insurance company. Pursuant to Rule 28.1 of the Rules of this Court, respondent states that its parent corporations are Transamerica Corporation, Transamerica Insurance Corporation of California, and Transamerica Insurance Group. Respondent's affiliates or subsidiary corporations, apart from wholly-owned subsidiaries, are River Thames Insurance Company Limited and Industrial County Mutual Insurance Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
STATEMENT	1
REASONS FOR DENYING THE PETITION	6
I. THE DISTRICT COURT, APPLYING STATE LAW, CORRECTLY DIRECTED THE JURY TO DETERMINE WHETHER IT HAD BEEN PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT THE LOST POLICIES PROVIDED PRODUCT LIABILITY BODILY INJURY COVERAGE WITHOUT AGGREGATE LIMITATION	7
II. THIS CASE DOES NOT PRESENT THE EXCEPTIONAL CIRCUMSTANCES UNDER WHICH THIS COURT REVIEWS FEDERAL COURT RESOLUTION OF QUESTIONS OF STATE LAW	17
III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING INTO EVIDENCE CERTAIN NATIONAL BUREAU UNDERWRITING MANUALS	18
CONCLUSION	23
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:	Page
Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co., 707 F. Supp. 762 (E.D. Pa. 1989)	11
Bishop v. Wood, 426 U.S. 341 (1976)	18
Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985)	18
In re Greggerson's Estate, 344 Pa. 498, 25 A.2d 711 (1942)	8
Greene Tweed & Co. v. The Hartford Ins. Co., Nos. 2953, 3098 (Pa. Super. 1988)	12,13
Haring v. Prosise, 462 U.S. 306 (1983)	17
Huddleston v. Dwyer, 322 U.S. 232 (1944)	17
In re Japanese Electronics, 723 F.2d 238 (3d Cir. 1983)	20
Keene Corp. v. Insurance Co. of North America, 1981 WL 1753 (D.D.C. Jan. 30, 1981) (Westlaw, DCT database)	8, 13
Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918 (3d Cir. 1986)	20
Mattocks v. Daylin, Inc., 452 F. Supp. 512 (W.D. Pa. 1978)	12
McQueen v. Wilmington Trust Co., 779 F.2d 916 (3d Cir. 1985)	20
Miller v. Boston Ins. Co., 420 Pa. 566, 218 A.2d 275 (1966)	12
Morie v. New Jersey Mfrs. Indem. Ins. Co., 48 N.J. Super. 70, 137 A.2d 41 (1957)	12
Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985)	18

Page

Tayloe v. Riggs, 26 U.S. (1 Pet.) 591 (1828) 17
UNR Indus., Inc. v. Continental Ins. Co., 682 F. Supp. 1434 (N.D. Ill. 1988) 14
Vanhorn v. Munnell, 145 Pa. 497, 22 A. 985 (1891) 8, 9
Wheatcroft v. Albert Co., 407 Pa. 97, 180 A.2d 216 (1962) 8

Miscellaneous:

Federal Rule of Evidence 901 . . . . . 19, 20
19 G. Couch, *Couch on Insurance 2d* § 79:315 (rev. ed. 1983) 10
1 Weinstein & Berger, *Weinstein's Evidence* 103-56, 103-76, 103-77 (1989) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1247

H.K. PORTER COMPANY, INC.,

Petitioner,

v.

TRANSAMERICA INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Judgment Order of the United States Court of Appeals for the Third Circuit.

STATEMENT

On February 27, 1984, H.K. Porter Company, Inc. (Porter) filed a declaratory judgment action against Transamerica Insurance Company (Transamerica) seeking nearly unlimited product liability bodily injury coverage under insurance policies

issued in the years 1952 and 1953. As the basis for the action, Porter alleged that it has been named as a defendant or third-party defendant in numerous lawsuits seeking damages for asbestos-related injuries. Porter also alleged that in a large number of the cases, its liability is predicated on the fact that it is the legal successor to Thermoid Company (Thermoid), the alleged insured in this case. As a result of the lawsuits, Porter began an intensive search for evidence of any insurance covering the claims against it as the successor to Thermoid. After considerable efforts, Porter located a file in a Consolidated Rail Corporation warehouse labelled "Thermoid Corporation." The file contained three certificates of insurance and correspondence relating to the certificates.[1] The certificates and correspondence evidence a transaction whereby the Pennsylvania Railroad agreed to lease to Thermoid certain property adjacent to Thermoid's plant for use as an employee softball field.[2]

The three certificates describe blanket liability insurance policies covering the years 1952-53, 1953-54, and 1954-55 which Manufacturers Casualty Company (Manufacturers) issued to Thermoid. Transamerica's alleged liability in this case was predicated on its status as the corporate successor to Manufacturers. Typewritten on the certificates describing policies covering the years 1952-53 and 1953-54 is the phrase "including products." In addition, in spaces specifically provided for the

---

[1] A certificate of insurance is not an actual insurance policy or even a portion of an insurance policy. It does not and is not intended to convey all of the terms of the insurance policy. Rather, a certificate of insurance is a document an insurer typically provides to a third-party as evidence of insurance.

[2] Because lease of the softball field was at issue, the correspondence related to whether the certificates indicated Thermoid had obtained coverage for contractual liability potentially arising out of the lease.

purpose, the certificates indicate the 1952 and 1953 policies provided coverage for product liability bodily injury claims up to $50,000 per person and $100,000 per accident. Neither of these two certificates describing the policies, however, indicates the aggregate amount of coverage provided for product liability bodily injury claims. Neither of these two certificates contains a space in which such an aggregate could be entered.[3]

Based upon information contained in the certificates, Transamerica and Porter were able to identify and stipulate to the forms or specimens used to create the policies at issue. By so stipulating, the parties agreed that the actual policies, although lost, contained the following language regarding aggregate limits on product liability bodily injury coverage:

> With respect to damages arising out of the possession, consumption, handling or use away from premises of the Insured, of any merchandise or product manufactured, sold, handled or distributed by the Insured or out of operations completed by or for the Insured and away from premises of the Insured, the liability of the Company, subject to the above limits for each person and each accident, shall be limited, in respect of all accidents occurring during each twelve (12) months of the Policy Period, in the aggregate to $ for bodily

---

[3] In contrast, the form used to complete a third certificate, describing a policy covering the 1954-55 period, contains a specific line on which to enter a product liability bodily injury coverage aggregate limit. Because that line was completed in the amount of $250,000, Transamerica and Porter agreed the aggregate limit on product liability bodily injury coverage under the 1954-55 policy was $250,000. Moreover, because Transamerica has made $250,000 in indemnity payments to Porter under the third policy, coverage under the policy is not in dispute.

injury including death at any time resulting therefrom and to $ for property damage.

On December 5, 1986, the district court issued a pretrial order dividing trial of the case into three phases. Phase I was to determine "[t]he existence and material provisions of the insurance policies, including limits of liability, if any." Phase II, if necessary, was to involve questions concerning "[t]he application of the insurance contracts to the asbestos-related bodily injury claims." Phase III, if necessary, was to involve "calculation of damages under Porter's breach of contract action and the rendering of declaratory relief."

On February 13, 1989, jury trial on the Phase I issues began. At trial, Porter's testimonial proof essentially consisted of two witnesses. Porter offered the first, Robert Acklen, as an expert who had experience as a claims adjuster, salesperson, and lecturer on the topic of insurance. Acklen had never sold any policies for Transamerica and had never heard of Manufacturers prior to being retained by Porter. Accordingly, Acklen based his testimony solely on his review of the documents in the case. Based on that review, Acklen concluded that in the absence of an aggregate limit noted on the certificates, no aggregate would apply to claims arising under the policies. Porter also introduced the testimony of Fred Corcoran, a claims manager for Manufacturers from 1949 until he was fired in 1955. Corcoran testified that he had seen liability insurance policies issued by Manufacturers with product liability bodily injury coverage where there was no aggregate stated. Corcoran could not, however, recall the identity of any insureds who had allegedly purchased such policies.

In contrast, Transamerica presented the testimony of Jack String, the underwriter employed by Manufacturers in the early 1950's who was responsible for writing the coverage which Thermoid purchased, and Lee Walton, the agent responsible for the policies issued to Thermoid. String testified that he remembered preparing and issuing the policies. In addition, he testified that although he could not recall specific details, he had never rated or seen a policy providing product liability bodily injury coverage without an aggregate limit. Further, String testified that because all of the published rates in the insurance industry in the 1950's were predicated on the existence of an aggregate limit, it would have been impossible to issue a policy covering product liability bodily injury without an aggregate limit.

Consistent with String, Walton testified that all of the Manufacturers policies he ever sold covering product liability bodily injury claims contained an aggregate limit. Moreover, Walton testified that while he could not recall specific provisions of the policies at issue, if he had in fact sold Thermoid product liability bodily injury coverage without aggregate limitation, he would have remembered the event because it would have been so unusual that it would have been the talk of the insurance industry.[4]

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[4] Transamerica also introduced the expert testimony of Ronald Almquist. Mr. Almquist had served as an underwriter for St. Paul Fire and Marine Insurance Company from 1955 to 1984. During that time, Almquist reviewed thousands of insurance policies from the early 1950's. Almquist testified that of the many policies he had reviewed, he had never seen a policy providing product liability bodily injury coverage without an aggregate limit on such coverage. In addition, Almquist testified that industry practice in the early 1950's required an aggregate limit on product liability bodily injury coverage and that if the "per accident" limit were greater than $25,000, the aggregate limit would be the same as the "per accident" limit.

At the close of the trial, the district court, applying state law, instructed the jury to determine whether it had been proven by clear and convincing evidence that either of the policies contained a term providing product liability bodily injury coverage without aggregate limitation.[5] The jury returned a verdict in favor of Transamerica, finding that the policies did not provide coverage without aggregate limitation. On February 27, 1989, the district court entered judgment in accordance with the jury verdict. Porter appealed the judgment to the United States Court of Appeals for the Third Circuit. By Judgment Order dated September 26, 1989, the Third Circuit summarily affirmed the judgment of the district court. Thereafter, Porter petitioned the Third Circuit for rehearing or rehearing en banc. On November 9, 1989, the Third Circuit denied Porter's petition. Porter now seeks review of the Third Circuit's summary affirmance.

REASONS FOR DENYING THE PETITION

This case does not, as Porter suggests, present "an appropriate vehicle by which this Court can begin to address the asbestos litigation logjam." Porter's Petition for a Writ of Certiorari at 9. To the contrary, this case presents a narrow issue of state law as to the proof required of a party seeking to recover under the terms of a lost insurance policy.[6] The district court, applying well-settled Pennsylvania law, properly instructed the jury to

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[5] The district court's bench ruling concerning the burden of proof is reprinted in the Appendix to this brief at 1a-5a. In addition, the special verdict returned by the jury is reprinted in the Appendix at 6a.

[6] In point of fact, Porter's contention that this case presents an appropriate vehicle for this Court to address issues relating to asbestos litigation is belied by the fact that, just prior to trial, Porter moved the district court to direct neither party to raise the nature of the claims for which it sought coverage, i.e., asbestos claims. Transamerica did not oppose the motion.

determine whether it had been proven by clear and convincing evidence that the lost policies provided product liability bodily injury coverage without aggregate limitation. Accordingly, because the lower courts correctly applied state law relating to lost instruments, this case does not present the exceptional circumstances under which this Court should review the lower courts' determination of a question of state law.

I. THE DISTRICT COURT, APPLYING STATE LAW, CORRECTLY DIRECTED THE JURY TO DETERMINE WHETHER IT HAD BEEN PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT THE LOST POLICIES PROVIDED PRODUCT LIABILITY BODILY INJURY COVERAGE WITHOUT AGGREGATE LIMITATION.

Notwithstanding Porter's contentions concerning the growth and volume of asbestos litigation and the effect of such litigation on state and federal courts, *see* Petition for Writ of Certiorari at 9-14, this case involves a very narrow question of state law concerning the proof required of a party seeking to recover under a lost insurance policy. Specifically, Porter contends that insurance policies purchased in 1952 and in 1953, which are now lost, contained a term providing it with nearly limitless coverage for product liability bodily injury claims. In an attempt to meet its burden under state law, Porter stipulated, on the basis of available specimen or form policies, that the lost policies contained a term relating to the aggregate limit of product liability bodily injury coverage afforded under the policies. That term, however, contained a blank to be completed in the actual policies by filling in the amount of the aggregate limit.

As the master of its claim, Porter could have argued that the blank relating to the aggregate limit term contained any figure. Instead, Porter chose to argue that the blank in the policies was

intentionally left empty and that, therefore, it enjoyed product liability bodily injury coverage without aggregate limitation. Porter's decision to argue that it enjoys nearly limitless coverage does not, however, alter the applicable state law and require Transamerica to prove otherwise. Rather, the lower courts properly interpreted the applicable state law to require Porter to establish by clear and convincing evidence the amount of coverage the lost policies afforded.[7]

Under the clear Pennsylvania law applied by the lower courts, a party seeking to recover under a lost instrument must prove the contents of the instrument by clear and convincing evidence.[8] *See, e.g., Keene Corp. v. Insurance Co. of North America*, 1981 WL 1753 (D.D.C. Jan. 30, 1981) (Westlaw, DCT database) (lost insurance policy); *Wheatcroft v. Albert Co.*, 407 Pa. 97, 180 A.2d 216 (1962) (lost deed); *In re Greggerson's Estate*, 344 Pa. 498, 25 A.2d 711 (1942) (lost note). Thus, Porter must prove all of the terms of the lost policies by clear and convincing evidence. Porter may not prove only selected portions of the policies, and shift the burden to Transamerica to prove the remaining terms.

In *Vanhorn v. Munnell*, 145 Pa. 497, 22 A. 985 (1891), one of the earliest Pennsylvania cases concerning proof required to recover under a lost document, the plaintiff brought an action

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[7] Porter contends that the lower courts' decisions placed on it the burden of proving a negative — the nonexistence of a limitation on coverage. Petition for Writ of Certiorari at 14-16. Yet, as the proponent of nearly limitless coverage, Porter was obliged to prove such coverage.

[8] In its petition, Porter states that "[t]he burden of proof issue is controlled by state law," and that either Pennsylvania or New Jersey law applies. Petition for Writ of Certiorari at 15 n.16. In addition, Porter states that the potential sources of state law in this action, Pennsylvania and New Jersey, are identical. *Id.*

for specific performance of a lost instrument that had been drafted some twenty-three years prior to trial. At trial, the plaintiff called as a witness the person who drafted the lost document at issue. The witness testified that he never saw the document after he drafted it, but that "[t]here are some things that I know and some things that I do not recollect." *Id.* at 985. Moreover, when questioned whether the document at issue contained certain specific terms, the witness testified that it may have, but that such terms would have been immaterial to the witness. *Id.* at 986. The witness also testified that he recalled only "the principal points." *Id.* Based on the testimony, the Pennsylvania court refused to enforce the lost instrument stating that "[f]or specific performance . . . it is indispensable to prove, by the most clear and indisputable evidence, the precise terms of the agreement. . . . And this necessarily means the whole agreement." *Id.* at 985.

Thus, under the clear Pennsylvania law dating back to *Vanhorn*, Porter may not prove only a portion of the lost policies. The specimen or form policies which the parties stipulated served as a model for the policies here at issue indisputably contained a term relating to the aggregate limit of product liability bodily injury coverage. As the lower courts ruled, under Pennsylvania law, proof of the contents of the lost policies necessarily requires proof of the contents of the term relating to the aggregate limit.

In this light, Porter's argument that "[u]nder the logic of the lower courts' rulings, the proponent of a lost insurance policy may be required to prove the nonexistence of whatever exclusions, exceptions, and coverage restrictions that the insurer may claim," *see* Petition for Writ of Certiorari at 17, is simply irrational and ignores the facts of the case. Rather, as a party

seeking to recover under a lost instrument, Porter had to prove "the precise terms of the agreement. . . . And this necessarily means the whole agreement." *See Vanhorn*, 22 A. at 985. Porter stipulated that the policies at issue contained a term relating to the aggregate limit of product liability bodily injury coverage. Under Pennsylvania law, therefore, Porter had the burden of proving that the term provided the nearly limitless coverage it claimed.

In addition, the general rule Porter cites that "[t]he insurer bears the burden of proving the applicability of policy limitations and exclusions in order to avoid an adverse judgment after the insured has sustained its burden and made its *prima facie* case," *see* Petition for Writ of Certiorari at 15, citing 19 G. Couch, *Couch on Insurance 2d* §79: 315 (rev. ed. 1983), is fully consistent with the decisions of the lower courts and does not require Transamerica to prove the coverage term at issue in this case. Application of the term relating to the aggregate limit of product liability bodily injury coverage afforded under the lost policies cannot be at issue unless and until the aggregate limit terms have been proved. The general rule does not shift to Transamerica the burden of proving selected terms of a lost policy. Rather, where the policy is lost, the insured, as part of its *prima*

facie showing, must establish the policy terms, including those terms setting forth policy limits.[9]

The district court's pretrial order recognized as much, stating that Phase I of the action was to "determine the existence and material provisions of the insurance policies, including limits of liability, if any." In contrast, Phase II of the action, had it been necessary, was to have involved questions concerning "[t]he application of the insurance contracts to the asbestos-related bodily injury claims." Thus, pursuant to the pretrial order, had Porter succeeded in proving the aggregate limit term in the policies, that term as well as other terms and conditions in the policies would have been applied to the asbestos injury claims in Phase II.[10]

In this light, the authorities Porter cites as setting forth the general rule that the insurer bears the burden of proving the applicability of policy exclusions are inapposite because they

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[9] Even if the policy were not lost, Porter would still bear the burden of showing that its claim falls within the coverage of the policy. Thereafter, if necessary, Transamerica would have been allowed to establish that Porter's coverage, if such coverage had been established, was exhausted. As a practical matter, however, if Porter had proved the contents of the aggregate limit terms, whether by producing the actual policies or by sufficient proof of the contents of the lost policies, issues relating to exhaustion of the limits would have been clearly defined because the parties stipulated that Transamerica had made $200,000 in indemnity payments under the policies.

[10] For example, Phase II would have involved a determination of a number of affirmative defenses, including late notice and exhaustion of policy limits. Transamerica has taken the position that even if the policies at issue provided coverage without aggregate limitation, the "per accident" limit contained in the policies would bar further indemnity payments because there was only one accident involved in the decision to manufacture products containing asbestos. *See Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762, 771-73 (E.D. Pa. 1989).

address the application and interpretation of exclusions set forth in known and admitted policies rather than proof of a term in a lost policy setting forth the amount of coverage. For example, *Mattocks v. Daylin, Inc.*, 452 F. Supp. 512 (W.D. Pa. 1978), cited in Petition for Writ of Certiorari at 15, involved the question whether the insurer had a duty to defend its insured despite a known exclusion contained in a "vendor's endorsement" to the policy. Similarly, *Morie v. New Jersey Manufacturers Indemnity Insurance Co.*, 48 N.J. Super. 70, 137 A.2d 41 (1957), cited in Petition for Writ of Certiorari at 15, involved the question whether a clause excluding auto coverage for damage caused by "wear and tear, freezing, mechanical or electrical breakdown or failure" applied to bar recovery for the insured's claims. In both *Mattocks* and *Morie*, the policies were not lost and their terms were available to the court.[11]

In contrast to the inapposite authorities Porter has cited, case law in Pennsylvania and elsewhere addressing disputes relating to alleged coverage under lost policies purportedly covering asbestos-related claims solidly supports the rulings of the lower courts. That law requires the party seeking to recover under a lost policy to prove by clear and convincing evidence the terms of the policy, including the aggregate limits on coverage. In *Greene Tweed & Co. v. The Hartford Insurance Co.*, Nos. 2953, 3098 (Pa. Super. 1988), reprinted in Appendix at 7a-11a, Greene Tweed sought a declaration that certain lost insurance policies

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[11] Similarly, *Miller v. Boston Insurance Co.*, 420 Pa. 566, 570, 218 A.2d 275, 277 (1966), cited in Petition for Writ of Certiorari at 15, involved application of a known policy exclusion. The case turned on whether an exclusion in a "Jewlers' Block Policy" barring recovery for "[u]nexplained loss, mysterious disappearance, or loss or shortage disclosed in inventory," applied to bar recovery for loss of a ring. The case does not address the proof required to recover under a lost policy.

would have provided coverage for an action brought against it seeking recovery for asbestos-related injuries. The Pennsylvania Superior Court, applying Pennsylvania law, affirmed the trial court's finding that Greene Tweed failed to meet its burden of proving the existence of the lost policies by clear and convincing evidence. In addition, the court affirmed the trial court's dismissal because Greene Tweed failed to produce "evidence from which [the trial court could] ascertain the terms of coverage, or whether there are applicable exclusions." *Id.* at 5.

Similarly, in *Keene Corp. v. Insurance Co. of North America*, 1981 WL 1753 (D.D.C. Jan. 30, 1981) (Westlaw, DCT database), a case applying Pennsylvania law in a situation similar to this case, the plaintiff claimed that it was insured under lost policies covering the period from 1948 to 1959. The plaintiff introduced into evidence the standard form policies used during the period, as well as other evidence as to the contents of the policies. The court found that the plaintiff failed to carry its burden of proof, stating:

> Basically, [the plaintiff] has shown that the standard form CGL policies sometimes make products coverage mandatory and that [the insurer] used standard CGL policies. [The plaintiff] argues that its showing shifts the burden of proof to [the insurer] to show that products coverage was explicitly excluded by a separate exclusionary endorsement. . . . The Court disagrees. Irrespective of the form used, product coverage . . . was indicated by a separate premium charge for products liability and an aggregate limitation on the declarations page of a policy. [The plaintiff] has failed to

> offer a declarations page showing products coverage was included.

Id. at 2.

Finally, in *UNR Industries, Inc. v. Continental Insurance Co.*, 682 F. Supp. 1434 (N.D. Ill. 1988), *amended without relevant change*, 1988 WL 121574 (Nov. 9, 1988), the plaintiff sought coverage under a lost policy for asbestos-related claims. The insurer denied the policy contained product liability coverage. At trial, the district court instructed the jury that, pursuant to Illinois law, the plaintiff had to prove by clear and convincing evidence:

> (1) the policy period; (2) that the policy provided liability insurance for bodily injury, sickness or disease caused by accident; (3) that products hazard insurance coverage was provided; and (4) the limits of the coverage and aggregate products limits, if applicable.

Id. at 1442. Moreover, in a post-trial motion, UNR argued to the court that the instruction improperly required the insured to prove an exclusion from coverage. The court rejected the argument, stating:

> UNR was not required to prove that there was no exclusion of the products hazard from the . . . policies. Rather, it was required to prove the contents of the lost policies, including any exclusion. . . . UNR was not entitled to a presumption that coverage was provided or to an instruction shifting the burden to prove an exclusion to National Surety.

Id. at 1447-48.

In sum, the case law from Pennsylvania, as well as case law from other jurisdictions, is clear that Porter, as a party seeking to recover under lost insurance policies, had to prove the terms of the lost policies. Moreover, proof of the terms of the lost policies required proof of the amount of the aggregate limits which the parties stipulated were contained in the lost policies.

In addition to the case law directly on point, the aggregate limitation on coverage is, as the district court ruled, a term and condition of the policy that the insured must prove in order to establish coverage rather than an exclusion from coverage. In so ruling, the district court examined the paragraph of the specimen policy containing a blank for the aggregate limit term, stating:

> Paragraph 4, is of course . . . headed limits of liability. And that provides for a per person limit, a per accident limit, and also, with regard to products liability bodily injury coverage, for an aggregate limit. And that, I believe [is] a factor that must be established by the plaintiff, in order to recover under this policy, that's not an exclusion by the very terms of the policy . . . the aggregate limit is set forth as a limitation of liability. Now, if there was not a blank in that policy for aggregate limits for products liability, then I think you might have a different situation. . . . But you are faced with a contract which sets forth that it will pay within the limits of liability of the policy, and then the limits of liability are very clearly defined and set forth in paragraph . . . 4 of that policy. And I don't know how we can call that an exclusion.

District Court Ruling, Appendix at 4a.[12]

Ignoring the clear state law to the contrary, Porter argues that public policy will somehow be served by review of the lower courts' decisions. Yet, Porter's argument ignores the fact that it has waited decades to bring its claim that it enjoys nearly limitless coverage. During that time, the relevant policies have been lost, witnesses have died, and other witnesses have lost their ability to remember important events. But for Porter's delay and failure to produce the policies, this dispute may have been avoided. To reward Porter by presuming it enjoyed nearly unlimited coverage under the lost policies can only serve to invite assertion of fraudulent claims.

It is for precisely this reason that the law of Pennsylvania requires parties seeking to recover under a lost instrument to prove the contents of the lost instrument by clear and convincing evidence. Parties who reduce their agreements to writing are entitled to expect a high degree of safety and reliability. As Chief Justice Marshall stated long ago:

> When parties reduce their contract to writing, the obligations and rights of each are described, and limited by the document itself. The safety which is expected from them, would be much impaired, if they could be established upon uncertain and vague impressions made by

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[12] In addition, the district court compared the aggregate limit terms to the per person limits and per accident limits on coverage which counsel for Porter conceded it must prove. The district court found that, although each of the aforementioned terms limits coverage insofar as the insured must show that its claim falls within the coverage afforded under the policy, the terms are not exclusions because they serve to initially define the coverage afforded under the policy. District Court Ruling, Appendix at 2a-3a.

> conversation antecedent to the reduction of the agreement.

Tayloe v. Riggs, 26 U.S. (1 Pet.) 591, 600 (1828).

In sum, as the party seeking to recover under a lost insurance policy, Porter had to prove by clear and convincing evidence that the coverage it claimed was indeed afforded it under the terms of the lost policies. As part of that proof, Porter stipulated that the lost policies contained terms relating to the aggregate limit of product liability bodily injury coverage. The lower courts, applying state law, properly instructed the jury to determine whether the policies contained an aggregate limit term affording Porter the nearly limitless coverage it claimed.

II. THIS CASE DOES NOT PRESENT THE EXCEPTIONAL CIRCUMSTANCES UNDER WHICH THIS COURT REVIEWS FEDERAL COURT RESOLUTION OF QUESTIONS OF STATE LAW.

Despite the hyperbole in Porter's petition relating to "the asbestos litigation logjam," *see* Petition for Writ of Certiorari at 9-13, Porter in fact seeks review of the lower federal courts' decision on a very narrow issue of state law. Yet, absent an exceptional case, this Court will not review the lower federal courts' resolutions of questions of state law. *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). More recently, in *Haring v. Prosise*, 462 U.S. 306 (1983), this Court emphasized "that, standing alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Id.* at 314 n.8.

Moreover, even if certiorari is granted for another reason, this Court will defer to the determinations of lower federal courts on issues of state law unless the lower courts' determination is

shown to be clearly wrong or unreasonable. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 & n.9 (1985); *see also Regents of University of Michigan v. Ewing*, 474 U.S. 214, 224 n.10 (1985); *Bishop v. Wood*, 426 U.S. 341, 346 n.10 (1976). Such deference is based on this Court's recognition that "district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett*, 472 U.S. at 500.

Faced with overwhelming authority that this case does not present the exceptional circumstances supporting this Court's review, Porter seeks to portray the decision of the district court and the summary affirmance of the Court of Appeals as so great a deviation from applicable state law as to effectively result in creation of a federal common law rule. Yet, review of the district court's bench ruling, reveals that the district court applied well-settled state, and not federal, law. *See* District Court Ruling, Appendix at 4a-5a. Applying that law, the district court properly instructed the jury to determine whether the policies contained aggregate limit terms affording Porter the nearly limitless coverage it claimed and the court of appeals summarily affirmed that determination. Accordingly, this case does not present the exceptional circumstances supporting this Court's review of the decisions of the lower federal courts concerning matters of state law.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING INTO EVIDENCE CERTAIN NATIONAL BUREAU UNDERWRITING MANUALS.

Porter seeks review in this Court to determine whether the district court abused its discretion in admitting into evidence

copies of manuals used by underwriters in the insurance industry during the early 1950's in writing product liability coverage. The testimonial evidence and the manuals themselves, however, provide more than sufficient evidence of authenticity to support their admission. Moreover, even assuming for the sake of argument that the district court erred in admitting the manuals, such error was clearly harmless and does not warrant supervisory review.

During the 1940's and 1950's, the National Bureau of Casualty Underwriters (National Bureau) published underwriting manuals that virtually all insurance companies in the United States used. These manuals provided rules for writing certain coverages and guides for setting premiums.[13] At trial, Transamerica introduced underwriting manuals in effect during the time periods of the relevant policies. Porter objected to introduction of the manuals arguing that they had not been properly authenticated pursuant to Federal Rule of Evidence 901.

Rule 901 states that authentication requirements are satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Applying the rule, the Third Circuit has noted that,

> [t]he burden of proof for authentication is slight. "All that is required is a foundation from which the fact-

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[13] The National Bureau of Casualty Underwriters later became known as the Insurance Services Organization. One of the "alterations" about which Porter apparently complains is the placement of an "ISO" stamp in the margin of the manuals, indicating that they were obtained from the Insurance Services Organization. Porter, however, did not object to the stamp at the time of trial and, therefore, should not be heard to raise the objection in this Court.

> finder could legitimately infer that the evidence is what the proponent claims it to be."

Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918, 927 (3d Cir. 1986), quoting *McQueen v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985), quoting *In re Japanese Electronics*, 723 F.2d 238, 285 (3d Cir. 1983), *cert. denied on other grounds*, 471 U.S. 1002 (1985).

Against this backdrop, the evidence is clearly sufficient to support the district court's decision to admit the manuals. First, the testimony of Ronald Almquist indisputably identified the manuals as National Bureau Underwriting manuals from the early 1950's. Almquist testified that as an underwriter working in the 1950's, he relied on a daily basis upon manuals like those introduced. Moreover, when presented with the manuals, Almquist readily identified them as copies of those promulgated by the National Bureau in the 1950's. Finally, Almquist testified that from his work as an underwriter, he was "very familiar" with the material contained in the manuals. Thus, the record is clear that Almquist sufficiently authenticated the manuals.

In addition to Almquist's testimony, the manuals were self-authenticating. Federal Rule of Evidence 901(b)(4) states that a matter may be self-authenticating simply by its "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances." The manuals are printed and contain distinctive type and charts. The cover page of one of the manuals (Trial Exhibit H) identifies it as a "Manual of Liability Insurance—Rules and Rates." The second page of the manual identifies it as "Product Liability Manual" and states that it was "Issued by National Bureau of Casualty Underwriters, 125 Maiden Lane, New York, N.Y.

10038." Thus, the unique nature and appearance of the manuals, combined with Mr. Almquist's identifying testimony, leaves no doubt as to the authenticity of the manuals.

Porter contends that Almquist's testimony is insufficient to authenticate the manuals because he could not testify as to their source or maintenance. The manuals were not, however, offered as the actual manuals Almquist personally used in the 1950's. Rather, they were offered as copies of manuals in use by underwriters across the country during the early 1950's. Thus, it is immaterial that Almquist could not identify the source of the manuals or establish a "chain of custody," given that Almquist recognized the manuals as authentic on sight.[14]

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[14] Similarly, Porter contends that the manuals were not properly authenticated because notations were added to reflect the effective dates of the manuals, and the manuals were incomplete. With respect to the dates, the manuals were in looseleaf form. Therefore, each page of the manuals was sequentially paginated and separately dated. For example, the pages relating to aggregate limits for product liability coverage in Trial Exhibits H and I are dated "Effective April 17, 1950." The similar page in Trial Exhibit J bears the date "Effective December 15, 1952." Thus, effective dates of the rules contained in the manual are obvious from each page in the manuals.

Concerning the completeness of the manuals, at trial Porter introduced several pages relating to exceptions to the material in the manuals required by various states. Notwithstanding this fact, Almquist testified that the exhibits were complete with respect to the general underwriting rules contained in the bodies of the manuals. In addition, Almquist testified that exception pages never changed the general rules contained in the bodies of the manuals but simply provided for minor state-by-state variations in classifications and rates. Finally, Almquist testified that the exception pages never changed the rule that policies providing product liability coverage must contain an aggregate limit on such coverage and that the aggregate limit was, as a general rule, the same as the "per accident limit." Thus, while the manuals may not have contained every conceivable page that they could have contained, any missing pages are immaterial and do not affect the admissibility of the manuals.

Finally, even assuming the district court erred in admitting the manuals, such error was clearly harmless. Rule 103(a) of the Federal Rules of Evidence provides that error in admitting or excluding evidence may be grounds for reversal only if the error affected a "substantial right of the party." Instances in which the evidence is merely cumulative, or does not relate to a material fact, are generally found to involve harmless error. 1 Weinstein & Berger, *Weinstein's Evidence* 103-56, 103-76, 103-77 (1989). The record in this case clearly shows that any error in admitting the manuals was harmless because the evidence contained in the manuals was merely cumulative of other overwhelming evidence Transamerica introduced.

In this regard, the testimony of the only witnesses with personal knowledge of the lost policies was unanimous that the policies provided for an aggregate limit on products coverage. For example, Lee Walton, the insurance agent for Thermoid, testified that he remembers the Thermoid account and that he never sold a policy that did not have an aggregate limit on product liability coverage. Walton also testified that industry practice in the 1950's was to always impose an aggregate limit on products coverage and that in cases where the per accident limit was greater than $25,000, the aggregate limit would be the same as the "per accident" limit.

Similarly, Jack String, the underwriter at Manufacturers who recalls writing the policies, testified that in over 30 years in the insurance industry he never wrote a policy without an aggregate limit for products liability coverage. Finally, Ronald Almquist testified that it was standard industry practice to always write products liability coverage with an aggregate limit and that the standard practice was that the aggregate limit was the same as the "per accident limit." In light of this testimony, the

manuals simply corroborated the substantial testimony of Walton, String and Almquist. Thus, admission of the manuals, even if in error, was clearly harmless.

In sum, the district court did not abuse its discretion in finding that Transamerica provided sufficient evidence of the authenticity of the underwriting manuals to support their introduction into evidence. Moreover, any error by the district court in admitting the manuals was harmless because the manuals merely corroborate overwhelming testimonial evidence that Transamerica introduced.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

THE COURT: Well, there is a difference. One policy was a year later.

MR. KANE: That's true.

THE COURT: And the jury could conclude, I suppose, that maybe for the second policy the fact that they're continuing to show in their certificates of insurance that there was no aggregate limit that this indicated that there was in fact none. There's a difference. In any event, I'm going to submit it to them with two questions. And you can argue to them that the evidence is the same.

Now, if I can read the notes that I scribbled yesterday, I'll try to indicate my reasons on the record. First of all, the plaintiff has submitted authority in support of the proposition that the matter of limits of liability or aggregate limits of liability constitute exclusions which the defendant must prove in order to avoid liability. The principal case that is cited is the Emons case which is the New York case. That case, the posture of that case was a motion for summary judgment. And the Court, in denying the motion for summary judgment, found that there was an issue of fact remaining and simply stated that the limitation of liability placed in question by the — by Liberty may arguably be considered such an exclusion, such an exclusion being an exclusion which, under New York law, the insurance company had the burden to establish. And then indicated that the Court would deny the motion for summary judgment.

Well, that is, I think, a rather weak statement as to whether an exclusion — or whether the aggregate limits is in fact an exclusion. Under the policy state that it arguably can be considered

exclusion is a far cry from saying — and from a holding that it was in fact an exclusion. The Burroughs case which cites the Emons case, which was also cited by the plaintiff as one of its principal cases is even, I would say, weaker because they point to the Emons case and then they — with regard to the question of limits of liability, and then they conclude, but that's irrelevant because what we're determining here is whether or not the insurance company owed a duty to defend, and that does not depend upon the limits of liability.

Now, we might question that, and I guess in this case somewhere along the line we're going to have to rule on that, or may, but that, again, was a far cry from an endorsement and a following of the Emons case.

Now, reason and logic, I think, support the other position. We have a lost instrument. The general rule is that the one seeking to recover damages on its contract has the burden of proving that the party from whom they seek to recover rights under the contract owes those rights. And that's true where the contract is lost or not lost. And here we have a lost written document, and it seems to me rather clear that you must prove that there is — there remains a contractual duty owed to you by the insurance company. -

Well, what difference is there between a per person limit and a per accident limit and aggregate limit? If the policies provide for those, one would think that the person claiming a right to recover must show that the recovery — that the claim comes within the limits set by the policy for per person, limits set by the policy for per accident. Where the policies provide also an aggregate limit, or a space for aggregate limits as the specimen policies which the parties have stipulated were the specimen

policies of the manuscript policies that were issued in this case, then it it seems to the Court logical to require the person asserting the right to recover fill in the blanks.

Counsel for the plaintiff concedes that they must show the per person and per accident limits, but attempts, as counsel must, to draw a distinction between the aggregate limits, and made the argument, oral argument the other day, that this is in the form of an exclusion because it is the defendant's responsibility to show that the claim, which otherwise would be covered by the policy is — has exceeded the policy limits. Well, I don't understand why that should be. You admit that you have the responsibility to demonstrate that your claim comes within the chronological limitations of the policy, what — why would you not also have the responsibility to demonstrate that it comes within the monetary limitations of the policy or that there were no monetary limits?

There's another reason why I believe that the attempt to characterize the aggregate limits here as exclusions won't work. The policy that you have stipulated to as being the manuscript policy — I need the copy of the manuscript policy. It would be in the third —

THE CLERK: One of these two?

THE COURT: All right, this is fine. Provides in Roman numeral 1. In consideration of the payment of an advance premium of blank and subject to a minimum premium of blank and to the limits of liability, exclusions, conditions and other terms of the policy, the company agrees to pay on behalf of. Well, the policy itself distinguishes between limits of liability and exclusions.

Paragraph 4 is, of course — Roman numeral 4, is headed limits of liability. And that provides for a per person limit, a per accident limit, and also, with regard to products liability bodily injury coverage, for an aggregate limit. And that I believe a factor that must be established by the plaintiff, in order to recover under this policy, that's not an exclusion by the very terms of the policy that you're seeking to recover under, that you have stipulated as an accurate specimen of the policy, the aggregate limit is set forth as a limitation of liability. Now, if there was not a blank in that policy for aggregate limits for products liability, then I think you might have a different situation. Now then, I think that you would be able to establish on the face of the policy that you came within the limits of liability that were set forth there and it would become then the defendant's responsibility to demonstrate that there were aggregate limits of liability that also applied. But you are faced with a contract which sets forth that it will pay within the limits of liability of the policy, and then the limits of liability are very clearly defined and set forth in paragraph Roman 4 of that policy. And I don't know how we can call that an exclusion.

It appears also that the cases cited by the defendant are stronger. The Keene case flat out indicates that the person asserting the right to recovery under a lost insurance policy has the obligation of establishing by clear and convincing evidence the aggregate limits that were involved. And the UNR case, as well, supports that proposition.

So, for those reasons, I believe that the burden is on the plaintiff, where plaintiff seeks to recover under a written contract of insurance, written contracts of insurance that have been lost, and now the plaintiff has the burden of proving plaintiff's right to recover, the law of Pennsylvania, the law of New Jersey,

whichever you choose, both agree that under those circumstances the person asserting the right to recover has the obligation to prove every element necessary to the right to recover, and to prove that by evidence that is clear and convincing.

For those reasons, the Court will submit the interrogatory to the jury as we have indicated — have you passed those out to counsel?

THE CLERK: I gave them copies, yes.

THE COURT: Now, is that form — are those forms of interrogatories satisfactory? I understand that you believe there should be one, Mr. Kane, and you believe that it should be phrased another way with regard to burden of proof, but we do not mention the standard of proof in the question. But is that question — are those questions —

MR. KANE: We think this is acceptable, but, obviously, depends on what the standard is.

THE COURT: All right.

THE COURT: Mr. Seymour?

MR. SEYMOUR: As I indicated, given the Court's ruling on the law, I think this is a satisfactory way to present the special verdict to the jury.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

H. K. PORTER COMPANY, INC., a corporation, *Plaintiff,* v. TRANSAMERICA INSURANCE COMPANY, a corporation, *Defendant.*	Civil Action No. 84-442

SPECIAL VERDICT

1. Do you find that the insurance policy LB-1729 did not contain an aggregate limitation of liability for bodily injury products liability claims?

Yes _____ No ___X___

2. Do you find that the insurance policy LAB-1124 did not contain an aggregate limitation of liability for bodily injury products liability claims?

Yes _____ No ___X___

DATED this 22nd day of February, 1989.

/s/ Gayle C. Toth

/s/ Frank Vallecorse

/s/ Robert Fitzgerald

/s/ Jacob Casper

/s/ Gail Hiney

/s/ Patricia A. Frank

GREENE TWEED & COMPANY, *Appellant* v. THE HARTFORD INSURANCE COMPANY, *Appellee*	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2953 Philadelphia 1987

Appeal from Order Entered October 5, 1987, in the Court of Common Pleas of Montgomery County, Civil No. 82-11337

GREENE TWEED & COMPANY v. THE HARTFORD INSURANCE COMPANY APPEAL OF: DIANE BELL	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3098 Philadelphia 1987

Appeal from Order Entered October 5, 1987, in the Court of Common Pleas of Montgomery County, Civil No. 82-11337

BEFORE: CAVANAUGH, OLSZEWSKI, and MELINSON, JJ.

MEMORANDUM:

This is an appeal from the trial court's order dismissing appellant's exceptions to the trial court's entry of declaratory judgment in favor of appellee. Appellant raises one issue on this appeal: whether the trial court erred by issuing a declaratory judgment and dismissing appellant's complaint on the basis that appellant failed to prove an entitlement to coverage for the period 1947 through 1958 under policies of insurance written by appellee. We find appellant's contention to be meritless; accordingly, the order of the trial court is affirmed.

On November 20, 1979, a summons in trespass and assumpsit was issued by the trial court in the case of *John W. Bell, Jr. and Diane B. Bell, his wife v. Greene, Tweed & Co., Inc.* Subsequently, on November 6, 1980, Diane B. Bell filed a complaint against Greene, Tweed & Co., Inc. (Greene, Tweed) on her own behalf and as executrix of the estate of her late husband. Bell asserted that her husband was an electrician performing repairs at the Greene, Tweed plant from 1947 to 1950 and 1953 to 1958; and that during this time, he was exposed to asbestos, which subsequently resulted in his death. Greene, Tweed turned the matter over its insurance carrier, Hartford Insurance Co., which in turn referred the matter to its attorney. Hartford's attorney entered his appearance on behalf of Greene, Tweed in the *Bell v. Greene, Tweed* action. On January 23, 1981, Hartford's counsel withdrew his appearance on behalf of Greene, Tweed on the basis that Hartford had no record of coverage for Greene, Tweed for the periods of 1947 to 1950 and 1953 to 1958. On July 19, 1982, Greene, Tweed filed an action for declaratory judgment in the case of *Greene, Tweed & Co. Inc., v. The Hartford Ins. Co.*, seeking declaratory relief in the nature of a finding that Hartford issued insurance policies for the years 1947 to 1958 which would have provided coverage, or at least a defense, in the *Bell v. Greene, Tweed* action. The trial court entered a declaratory judgment finding that Greene, Tweed failed to meet its burden of proving the existence of insurance policies for the years 1947 through 1958. Greene, Tweed's exceptions to the declaratory judgment were dismissed by the trial court sitting *en banc*. This timely appeal followed.

In *Supp v. Erie Insurance Exchange*, 330 Pa.Super. 542, 479 A.2d 1037 (1984), this Court explained our standard of review in appeal from a declaratory judgment:

Because a declaratory judgment action follows "as nearly as may be" the practice and procedure in an action in equity, Pa.R.C.P. No. 1601(a), we will review the determination of the trial court as we would a decree in equity. Our scope of review is narrow.

> A chancellor's findings of fact, when approved by the court *en banc*, have the force and effect of a jury verdict and will not be disturbed on appeal if supported by adequate evidence. *Herwood v. Herwood*, 461 Pa. 322, 336 A.2d 306 (1975). However, the chancellor's inferences and conclusions, which are drawn from the facts, and the application of the law are always subject to review. *Adler v. Montefiore Hospital Association of Western Pennsylvania*, 453 Pa. 60, 311 A.2d 634 (1973), *cert. denied*, 414 U.S. 1131, 94 S.Ct. 870, 378 L.Ed.2d 755 (1974).

McDole v. Duquesne Brewing Co. of Pittsburgh, 281 Pa.Super. 78, 83, 421 A.2d 1155, 1158 (1980) (quotations and citation emitted)

Id. at , 479 A.2d at 1038. Instantly, we find that the record supports the trial court's findings of fact and that the trial court's conclusions of law are correct.

Greene, Tweed commenced this declaratory judgment action against Hartford to establish the existence of insurance policies issued by Hartford for the years 1947 through 1958 which would provide coverage, or at least a defense, for Greene,

Tweed in the case *Bell v. Greene, Tweed*.[1] The parties stipulated and, accordingly, the trial court found that a thorough search for the policies was made and that no policies for the years 1947 through 1958 could be located. In *Hacker v. Price*, 166 Pa.Super. 404, 71 A.2d 851 (1950), this Court explained:

> To recover on an instrument, the original of which has been lost, the burden of proving the loss of the original and that a diligent, bona fide and thorough search was made without success is upon the one offering secondary evidence. *Emig v. Diehl*, 76 Pa. 359; *Irwin v. Irwin*, 34 Pa. 525; *Laubach v. Meyers*, 147 Pa. 447, 23 A. 765. He is also required to prove its former existence, execution, delivery and contents. The evidence to sustain these averments must be clear and convincing. *Mahoney v. Collman*, 293 Pa. 478, 143 A. 186; 4 Wigmore, Evidence, 3d Ed., § 1194, p. 337. Whether the party offering secondary evidence has met this burden of proof successfully is a matter to be determined by the trial court and rests largely in the court's discretion which will not be disturbed on appeal unless there is a manifest abuse thereof. *Gorgas v. Hertz*, 150 Pa. 538, 540, 24 A. 756; *Muncey v. Pullman, Taxi Service Co.*, 269 Pa. 97, 112 A. 30.

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[1] At the time the declaratory judgment was being decided by the trial court, the underlying action, *Bell v. Greene, Tweed*, was awaiting trial in the Court of Common Pleas of Montgomery County. The parties to the action in *Bell v. Greene, Tweed* have since reached a settlement. The issue before this Court, however, is not rendered moot by that settlement. While it is no longer possible for Hartford to be required to defend the action in *Bell*, other claims of Greene, Tweed remain in dispute. The right to claim indemnity for the loss Greene, Tweed sustained in the *Bell* case still exists, as does the right to claim reimbursement for the sums paid by Greene, Tweed for counsel fees in defending the *Bell* action.

Id. at , 71 A.2d at 853. The trial court considered the deposition testimony of Leslie Bruchs, a retired insurance broker who serviced Greene, Tweed's insurance account; Walter Josephson, the retired executive vice-president of Greene, Tweed; and Ernest Fuchs, the retired assistant secretary and assistant treasurer of Greene, Tweed. In addition, the trial court looked at documents indicating that Hartford provided worker's compensation insurance for Greene, Tweed at least as early as 1951 and through the 1960's and that Hartford issued policies of general liability insurance to Greene, Tweed for the years 1966 through 1976. The trial court found that Greene, Tweed's proof of the existence of the disputed policies did not rise to the level of clear and convincing evidence. Moreover, the trial court explained that "even if we were to find that there was clear and convincing evidence that Hartford issued liability insurance policies to Greene, Tweed from 1947 through 1958, there is no evidence from which we can ascertain the terms of the coverage, or whether there are applicable exclusions." Trial court opinion at 12. Accordingly, we find that the trial court did not abuse its discretion by concluding that Greene, Tweed failed to meet its burden of proof.

Order affirmed.